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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 637[redacted]

BILLY E. McCLENNY, Petitioner,

v.

STATE OF COLORADO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

With admirable candor, petitioner has admitted that the question he here seeks to determine was not appropriately raised in, or ruled upon by, the Colorado Supreme Court. He further admits that the only time the question was presented, in any manner, to that court was by his petition for rehearing. Thus, the question before the court at this time is whether or not the petitioner has properly raised the federal question upon which he seeks to invoke this court's jurisdiction.

ARGUMENT

In the State of Colorado, review of criminal judgments is by writ of error to the Colorado Supreme Court. Such proceedings are specifically governed by Rules 33, 34, and 37(b), Colorado Rules of Criminal Procedure (Vol. 1, Colorado Revised Statutes, 1963). Rule 37(b) provides inter alia, as pointed out by petitioner, that only questions presented in a motion for new trial (Rule 33), or in a motion in arrest of judgment (Rule 34), shall be considered on review. Petitioner did not present the issue of the effect of the so-called "net worth" testimony in his motion for new trial; therefore, as a matter of state law, this issue was not before the Colorado Supreme Court for review. *Peterson v. People*, 153 Colo....., 384 P. 2d 460.

By virtue of Rule 39(c), Colorado Rules of Criminal Procedure, the practice governing the preparation of pleadings in the Supreme Court is governed by the Colorado Rules of Civil Procedure. Rule 118(b) of the latter specifically governs petitions for rehearing, and it is clearly set forth therein that such petition is limited to "points claimed to have been overlooked or misapprehended by the court". There is no provision for raising questions not already before the court. It is further provided that the only action that will be taken by the court is the granting or the denial of the rehearing. It thus becomes clear that the state procedure does not provide for the introduction of new questions in a petition for rehearing.

In *Herndon v. Georgia*, 295 U. S. 441, 79 L. ed. 1530, 55 S. Ct. 794, a case almost strictly in point with the instant matter, this court held:

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing: and that court then refused to consider it. The long established general rule is that the attempt to raise a federal question after judgment, upon petition for rehearing, comes too late, unless the court actually entertains the question and decides it. (Cases cited.)"

In view of this authority, respondent respectfully urges that the petition for writ of certiorari be denied for the reason that this court does not have jurisdiction over the question raised.

Respectfully submitted,

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